In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1429

RICHARD FINCKE AND ALBERT PRATA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of eleven counts of wire fraud in violation of 18 U.S.C. 1343 and one count of conspiracy (18 U.S.C. 371) to violate that statute. Petitioner Prata was sentenced to two years' probation and a fine of $2,500. Petitioner Fincke was sentenced to two years' probation and a fine of $7,500. The court of appeals affirmed (Pet. App. II).

The evidence showed that over a period of several years petitioners, utilizing a New York telephone com-

pany credit card, incurred but did not pay telephone charges exceeding $146,000 (A. 123).[1] They did this with the cooperation of one McCullough, a district manager with the telephone company. McCullough was indicted as a co-defendant, but was acquitted by the trial judge after summation and before submission of the case to the jury (A. 108, 168-174, 229-231).

Petitioners were the executives of Trans-America Corporation, the business of which ostensibly was the construction of prefabricated houses in Puerto Rico (A. 167). Petitioners obtained a telephone credit card in connection with their positions with the company. In 1962, when their bill came to McCullough's attention, petitioners were in arrears on their account by several thousand dollars. The delinquency persisted and grew to some eight or ten thousand dollars within the next several months. McCullough became alarmed and arranged an interview with petitioners (A. 160, 168.) They convinced him that prosperity was near and he continued their credit account (A. 169). Over the next six months petitioners continued in arrears and the bill mounted at a rate of $3,000 to $4,000 a month (A. 170-171). McCullough's collection efforts were unsuccessful, and he sought to conceal the problem from his superiors (A. 109-110). Although by 1963 Trans-America Corporation was defunct and had no assets, credit was continued (A. 19-20, 39-41, Tr. 675-680).[2]

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[1] "A." refers to the joint appendix in the court below.

[2] "Tr." refers to the trial transcript.

By March of 1967, the deficit had grown to $140,000 (A. 121). When Donald Taliaferro, McCullough's supervisor, discovered the deficit and McCullough's misdeeds, McCullough was discharged (A. 133). On April 7, 1967, Taliaferro notified petitioners by telephone, confirmed by registered mail, that as of that date their telephone service "was terminated and that the toll credit cards on account were also cancelled and that any further usage would be fraudulent" (A. 129-130). Nonetheless, during the following month $700 of calls were charged to petitioners' number (A. 136).

On May 4, 1967, Taliaferro met with petitioners, pointed out that they had made $700 of calls in the past month, and again informed them that such calls were fraudulent (A. 135, 136). Further toll calls continued, however, and nine of the eleven calls charged in the indictment were made after this second warning (Pet. App. IV, A-23).

Petitioners contend that there was no evidence to support their convictions because no showing of criminal intent was made (Pet. 11-15). This contention was made in the court below, and was rejected in that court's thorough opinion. Ten of the eleven calls charged in the indictment occurred *after* petitioners had been notified the first time that further calls would be fraudulent, thus refuting any notion that petitioners' actions were unknowing or unintentional. In this circumstance, the court of appeals properly concluded that the evidence supporting the verdict was "abundant and convincing" (Pet. App. II, A7, A16-A17).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

CERTIORARI
DENIED
N.C.R.

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